SJC-13101

ARNOLD EMMA vs. MASSACHUSETTS PAROLE BOARD & another.[1]

Suffolk. May 5, 2021. - September 28, 2021.

Present: Budd, C.J., Gaziano, Cypher, Kafker, Wendlandt, & Georges, JJ.

Parole. Imprisonment, Parole. Due Process of Law, Parole. Constitutional Law, Parole. Commissioner of Correction. Practice, Civil, Action in nature of certiorari, Report. Statute, Construction.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on February 19, 2021.

The case was heard by Lowy, J., a motion for reconsideration was considered by him, and questions of law were reported by him.

Kelly M. Cusack for the plaintiff.

Tara L. Johnston, Assistant Attorney General, for Massachusetts Parole Board.

Edward J. O'Donnell for Commissioner of Correction.

Jeffrey G. Harris, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

James R. Pingeon, David Milton, & Kristyn J.E. Henry, for Prisoners' Legal Services of Massachusetts, amicus curiae, submitted a brief.

[1] Commissioner of Correction.

WENDLANDT, J. In this case, we consider whether the medical parole scheme set forth in G. L. c. 127, § 119A (medical parole act),[2] authorizing the Commissioner of Correction (commissioner) to grant medical parole to terminally ill or permanently incapacitated prisoners, while delegating to the parole board (board) oversight of a medical parolee's compliance with the conditions of parole imposed, offends due process. We conclude that it does not.[3]

1. Background.[4] The facts are drawn from the parties' statement of agreed facts, "supplemented occasionally by other undisputed facts in the record." See Harmon v. Commissioner of Correction, 487 Mass. 470, 472 (2021).

The plaintiff was serving an eight-year sentence for breaking and entering a dwelling with the intent to commit a

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[2] See St. 2018, c. 69, § 97.

[3] We acknowledge the amicus briefs submitted by the Committee for Public Counsel Services, Massachusetts Association of Criminal Defense Lawyers, and Northeastern University School of Law Prisoners' Assistance Project; and by Prisoners' Legal Services of Massachusetts.

[4] Although the plaintiff passed away after oral argument in this case, we exercise our discretion to decide the matter given that the issues were fully briefed and argued before us, are of singular public importance with respect to the medical parole statute, and are likely to recur but to evade review. See Harmon v. Commissioner of Correction, 487 Mass. 470, 475 (2021); Carrasquillo v. Hampden County Dist. Courts, 484 Mass. 367, 379 n.16 (2020).

felony and armed assault with the intent to rob or murder. The sentence was due to terminate in 2024.

In 2020, the plaintiff was diagnosed with terminal cancer. In June of that year, the commissioner denied the plaintiff's petition for medical parole. Upon reconsideration, she allowed the petition. The plaintiff was released on medical parole to a specialized long-term care facility on October 1, 2020; a special condition of his parole required that he reside in that facility. Approximately two months later, the plaintiff was arrested for violating the terms of his release. He was alleged to have absconded from a major medical center in Boston, where he was receiving medical treatment, and to have failed to comply with the conditions of his release plan by refusing return to the long-term care facility identified in that plan.

The board provisionally revoked the plaintiff's medical parole, and he remained in custody awaiting a final revocation hearing. While in custody, the plaintiff was hospitalized after he contracted COVID-19, and his health further deteriorated. He filed a second petition for medical parole on January 28, 2021.

On February 10, 2021, the board held a final parole revocation hearing; it determined that the plaintiff had violated his special condition of parole as alleged, and revoked

his parole.[5] The board also stated that it "strongly support[ed]" the plaintiff's release "as soon as possible." Thereafter, the commissioner denied the plaintiff's second petition for medical parole.

The plaintiff sought review of the board's decision to revoke his medical parole by filing a complaint in the nature of certiorari, G. L. c. 249, § 4, in the county court; he asked the single justice to order his reparole and release and to issue a declaratory judgment that, to the extent that the medical parole act prevents the board from considering reparole, and reserves decisions on reparole solely to the commissioner, the act is unconstitutional. The single justice denied the complaint as well as a motion for reconsideration.

Recognizing that the case raised novel statutory and constitutional questions capable of repetition yet evading review, the single justice reported three questions of law to the full court:

> "1. Does the Parole Board have authority to reparole a medical parolee -- in other words, release him or her back into the community after it finds that the individual has violated his or her parole -- and, if so, what is the process by which it may do so[?]

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[5] The record indicates that although there were two alleged parole violations -- irresponsible conduct by absconding from supervision and violation of the special condition of parole that the plaintiff reside at a named long-term care facility (home plan) -- the board revoked the plaintiff's parole only on the violation of the condition of the home plan.

> "2. Does the Commissioner have authority to reparole an individual whose medical parole has been revoked by the board after he or she has violated parole, and, if so, what is the process by which she may do so[?]
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> "3. Does the statutory and regulatory scheme regarding the revocation of medical parole violate a parolee's due process rights, where it does not permit the board to release the parolee back into the community once it finds that he or she has violated the terms of his or her parole[?]"

The single justice ordered the parties to submit a statement of agreed facts "sufficiently comprehensive to enable the court to resolve the reported questions." The parties also were ordered to provide the court answers to other specific factual questions concerning the number of petitioners granted medical parole who had been found in violation and had had their parole revoked, the processes in place for review of any such revocation and for seeking to be reparoled, and the number of petitioners whose medical parole had been revoked who subsequently applied for reparole and the results of any such applications.

The single justice also ordered that, if the plaintiff were to appeal from the denials, any such appeal should be consolidated with the report of the questions of law. The plaintiff subsequently filed an appeal in this court, which has been so consolidated. In his appeal, the plaintiff argues that the medical parole statute creates a protected liberty interest; once the board begins revocation proceedings based on a purported violation, the board also is required to consider the

possibility of reparole; and a conclusion that the board has no authority to reparole a parolee who has been found in violation of medical parole would violate due process. Accordingly, the plaintiff argues that the single justice erred in denying his request for release from custody.

2. Statutory scheme. In light of our recent, detailed discussion of this process, see, e.g., Malloy v. Department of Correction, 487 Mass. 482, 484-487 (2021); Harmon, 487 Mass. at 472; Vazquez v. Superintendent, Mass. Correctional Inst., 484 Mass. 1058, 1058 (2020); Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 442 n.17, S.C., 484 Mass. 1029 (2020); Buckman v. Commissioner of Correction, 484 Mass. 14, 16-19, 22-23 (2020), we review here only briefly the procedure to be followed in seeking medical parole. The process commences when a prisoner or other authorized person files a petition with the superintendent of the correctional facility or the sheriff in charge of the house of correction or jail where the prisoner is serving his or her sentence. See G. L. c. 127, § 119A (c) (1), (d) (1). Upon receipt of a petition, the superintendent or sheriff has twenty-one days in which to consider the petition and to submit a recommendation to the commissioner that the petition be allowed or denied. See id. The commissioner then has forty-five days to issue a decision. See G. L. c. 127, § 119A (e). If the

commissioner determines that the prisoner is terminally ill or permanently incapacitated, the prisoner will live peacefully in society and not violate the law if released, and the prisoner's release is not incompatible with the welfare of society, the prisoner "shall be released on medical parole." See id.

The board imposes any "terms and conditions" on the prisoner's medical parole that it deems necessary, and may alter or amend these as needed, see G. L. c. 127, § 119A (f); these conditions are applicable through the date on which the prisoner's sentence would have expired, see G. L. c. 127, § 119A (e). During the prisoner's release, the prisoner is placed "under the jurisdiction, supervision and control of the parole board, as if the prisoner had been paroled pursuant to [G. L. c. 127, § 130]." G. L. c. 127, § 119A (f). Apart from the implementing regulations issued by the Secretary of the Executive Office of Public Safety and Security, see 501 Code Mass. Regs. §§ 17.00 (2019), the board has promulgated regulations governing its oversight responsibilities for all parolees, including medical parolees, see 120 Code Mass. Regs. §§ 100.00-900.00 (2017).

3. Discussion. We review the reported questions, which require interpreting statutory or constitutional provisions, de novo. See Commonwealth v. Soto, 476 Mass. 436, 438 (2017); Schulman v. Attorney Gen., 447 Mass. 189, 191, S.C., 448 Mass.

114 (2006). "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated" (citation omitted). Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006). "[W]here the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." Sharris v. Commonwealth, 480 Mass. 586, 594 (2018), quoting Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008). "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." Soto, supra, quoting Commonwealth v. Dalton, 467 Mass. 555, 557 (2014).

Certiorari is a "limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi judicial tribunal" (citation omitted). Indeck v. Clients' Security Bd., 450 Mass. 379, 385 (2008). A plaintiff is entitled to certiorari review only if the plaintiff can demonstrate "(1) a judicial or quasi judicial proceeding (2) from which there is no other reasonably adequate

remedy, and (3) a substantial injury or injustice arising from the proceeding under review." Id. "The function of judicial review in an action in the nature of certiorari is to correct substantial errors of law apparent on the record adversely affecting material rights" (quotation and citation omitted). MacLaurin v. Holyoke, 475 Mass. 231, 237 (2016). "Ordinarily, where[, as here,] the action being reviewed is a decision made in an adjudicatory proceeding where evidence is presented and due process protections are afforded, a court applies the 'substantial evidence' standard." Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 604–605 (2017), quoting Figgs v. Boston Hous. Auth., 469 Mass. 354, 361-362 (2014).

As the plaintiff's claims as to the board's authority and the procedures to be followed are subsumed in the reported questions, we focus our discussion on those questions, including the plaintiff's arguments in that context.

a. Parole board's authority. The first reported question asks whether the board has authority to reparole and release into the community an individual whom it has determined has violated the terms of his or her release.

The language of the medical parole act is plain as to the consequences of the board's finding that a medical parolee has violated the conditions of his or her release. General Laws c. 127, § 119A (f), provides:

> "If the board determines that the prisoner violated a condition of the prisoner's medical parole or that the terminal illness or permanent incapacitation has improved to the extent that the prisoner would no longer be eligible for medical parole pursuant to this section, the prisoner shall resume serving the balance of the sentence with credit given only for the duration of the prisoner's medical parole that was served in compliance with all conditions of their medical parole pursuant to subsection (e)" (emphases added).

The word "shall" indicates the absence of discretion by the board. See Hashimi v. Kalil, 388 Mass. 607, 609 (1983) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation"). Thus, the medical parole act requires the board to revoke an individual's release on parole where it finds that the individual violated a condition of parole. See Buckman, 484 Mass. at 25, quoting Sharris, 480 Mass. at 594 (language that is plain and unambiguous is conclusive as to legislative intent).

In his appeal from the single justice's denials of his complaint and motion for reconsideration, the plaintiff contends that this plain reading of the statute is in conflict with the board's "jurisdiction, supervision and control" of a medical parolee, G. L. c. 127, § 119A (f), as if the medical parolee were a standard parolee. There is no conflict. As discussed, once a medical parolee is released, the individual is subject to the board's jurisdiction, supervision, and control; the board determines the conditions of parole, monitors compliance with

them, and can revise, alter, or amend them as necessary. Id. If the board finds that a medical parolee has violated parole, however, the statute leaves the board no further discretion, and mandates that the person "shall" resume serving the balance of the sentence, subject to credit only for those periods of release during which the individual was in compliance with the conditions of parole. See id.

Accordingly, the answer to the first reported question is "no," the board does not have authority to reparole or release a medical parolee after it makes a determination that the parolee violated a condition of parole.

b. Commissioner's authority. The second reported question asks whether the commissioner has authority to reparole an individual whose medical parole has been revoked by the board after a finding of a violation, and, if so, the process to be followed.

The medical parole statute vests the commissioner with the authority to grant medical parole and requires the commissioner to do so where the commissioner finds that certain conditions have been met. General Laws c. 127, § 119A (e), provides:

> "If the commissioner determines that a prisoner is terminally ill or permanently incapacitated such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society, the prisoner shall be released on medical parole" (emphasis added).

The plain language of this provision mandates that a prisoner be released on medical parole when the statutory requirements have been met; nothing in the statutory language exempts from release those prisoners who have been released on medical parole and who have been returned to incarceration after the board revoked their parole upon a finding of violation. See Adoption of Marlene, 443 Mass. 494, 499 (2005), quoting Commonwealth v. Callahan, 440 Mass. 436, 443 (2003) ("We will not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design"). Indeed, the medical parole act apparently contemplates that prisoners will petition for medical parole multiple times. See, e.g., G. L. c. 127, § 119A (i) (requiring annual reporting on "the number of prisoners who have petitioned for medical parole more than once").

Accordingly, the answer to the second reported question is "yes," the commissioner has the authority to allow a petition for medical parole by an individual who previously has been released on medical parole but whose parole has been revoked due to a parole violation.

c. Due process rights. The third reported question asks whether the statutory scheme of the medical parole act violates a parolee's right to due process because it does not permit the

board to find a violation of parole, yet to decide nonetheless to release the individual back into the community.

To answer this question, we first must determine whether an individual who has been released on medical parole has a constitutionally protected liberty interest in maintaining that release, see Morrissey v. Brewer, 408 U.S. 471, 482 (1972), a question we declined to reach in Buckman, 484 Mass. at 31 n.26. We conclude that a medical parolee who has been released does have such a liberty interest. Whether, in consequence, "any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer a grievous loss,'" see Morrissey, supra at 481, quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), should the liberty interest be reduced or eliminated.

The United States Supreme Court has concluded that an individual who has been released on ordinary parole has a constitutionally protected liberty interest in maintaining that release. See Morrissey, 408 U.S. at 482; Greenman v. Massachusetts Parole Bd., 405 Mass. 384, 388 n.3 (1989), citing Morrissey, supra at 482-483. With respect to ordinary parole, "[i]mplicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his

parole." Morrissey, supra at 479. Although the parolee is subject to certain restrictions that are inapplicable to other residents of the Commonwealth, "his condition is very different from that of confinement in a prison." Id. at 482.

We discern no principled reason why a medical parolee would have a lesser interest in maintaining release; to the contrary, inherent in its very definition is the critical nature of that release and its timing. A medical parolee may have no opportunity to serve out a sentence and obtain release in the ordinary course, as does a prisoner seeking release on ordinary parole. A medical parolee, like a standard parolee, is able to be with family and friends and may "form the other enduring attachments of normal life." See Morrissey, 408 U.S. at 482. Such benefits are all the more important in the face of a permanently debilitating condition or terminal illness, where time to form these enduring attachments almost certainly will not be forthcoming at the end of what would have been the individual's original sentence. Again, like a standard parolee, a medical parolee "has relied on at least an implicit promise that parole will be revoked only if [the parolee] fails to live up to the parole conditions" or otherwise becomes ineligible for medical parole. Id. Accordingly, we conclude that a medical parolee has a constitutionally protected liberty interest in maintaining his or her release.

This liberty interest is protected by due process, and thus, "[i]ts termination calls for some orderly process, however informal." Morrissey, 408 U.S. at 482. "[T]he question remains what process is due." Id. at 481. Cf. Malloy, 487 Mass. at 496-498 (considering whether due process required immediate release upon commissioner's determination to grant petition for medical parole).

The United States Supreme Court has recognized that "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey, 408 U.S. at 481. "[N]ot all situations calling for procedural safeguards call for the same kind of procedure." Id. The Court in Morrissey sets forth procedural protections related to the accuracy of the factual determination of a violation. Those procedural protections also are encompassed in parole revocation regulations.[6]

[6] First, a parolee receives notice of the claimed violations. See 120 Code Mass. Regs. § 303.06 (preliminary revocation hearing and charges); 120 Code Mass. Regs. § 303.18 (final revocation hearing). The parolee then is provided disclosure of the evidence against him or her. See 120 Code Mass. Regs. § 303.10(3) (preliminary hearing); 120 Code Mass. Regs. § 303.21 (final revocation hearing). The parolee has the opportunity to be heard and to present evidence, see 120 Code Mass. Regs. §§ 303.10, 303.22, 303.23, and generally may confront adverse witnesses, 120 Code Mass. Regs. §§ 303.22(5), 303.23(2)(f). The parolee is evaluated by a neutral and detached hearing body (the board) that determines whether a violation occurred. 120 Code Mass. Regs. §§ 303.01, 303.06, 303.12(4). Ultimately, if a violation is found, the parolee

We are cognizant that, in Morrissey, 408 U.S. at 483-485, the Court considered a "typical" parole revocation process, whereby a determination is made as to whether a parole violation occurred; if so, a decision is made as to whether parole should be revoked. The Court did not consider in that case "a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition of probation or parole." See Black v. Romano, 471 U.S. 606, 612 (1985), as here.

That Morrissey, 408 U.S. at 483-484, "involved administrative proceedings in which revocation was at the discretion of the relevant decisionmaker" does not suggest that due process mandates such discretion. Black, 471 U.S. at 612. As the Court has explained, Morrissey's "discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole." See id., citing Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973). Accordingly, we conclude that due process requires neither that the same fact finder determine both whether a condition of parole has been violated and whether to reparole the individual nor that, once a

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receives a written summary of the reasons for revocation. 120 Code Mass. Regs. § 303.25.

violation has been found, the decision maker have discretion to determine whether to revoke parole.

Our conclusion does not require the board to revoke medical parole for mere "technical violations"[7] of parole conditions. The medical parole act provides that the board has the same authority over medical parolees as it does over standard parolees. See G. L. c. 127, § 119A (f) ("A prisoner granted release under this section shall be under the jurisdiction, supervision and control of the parole board, as if the prisoner had been paroled pursuant to [G. L. c. 127, § 130]").

Thus, the act contemplates that the board could adopt with medical parolees the same policies and procedures it employs in connection with its oversight of ordinary parolees. These include the graduated sanctions policy, 120 PAR §§ 600.01-600.13 (Oct. 2006), for minor infractions. In applying the graduated sanctions policy, a parole officer considers the "risk level of [the] offender, severity of the violation and parole adjustment, parolee behavior, prior sanctions," and "mitigating and aggravating factors." 120 PAR § 600.09. Indeed, in this case, prior to the incident at the hospital, the plaintiff had received a warning for behavioral issues at the long-term care

[7] A technical violation is "[a] violation of parole conditions that does not necessarily constitute grounds for revocation of parole." See Massachusetts Parole Board, Policies and Procedures, 120 PAR § 600.03 (Oct. 2006).

facility. The statute thus leaves the board with discretion not to initiate revocation proceedings for a "technical violation."

We answer the third reported question, "No," the statutory and regulatory scheme concerning the revocation of medical parole does not violate a parolee's right to due process.

4. Conclusion. We answer the first reported question, "No." We answer the second reported question, "Yes." We answer the third reported question, "No." Discerning no error in the single justice's decision that the board did not have authority to allow reparole of the plaintiff, we affirm.

So ordered.